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FINANCIAL INDUSTRY REGULATORY AUTHORITY
OFFICE OF HEARING OFFICERS

DEPARTMENT OF ENFORCEMENT, Complainant, v. RESPONDENT, Respondent.	Disciplinary Proceeding No. 2014040968501 Hearing Officer–DW

OMNIBUS ORDER ON PRE-HEARING MOTIONS

I. Introduction

The Department of Enforcement filed its Complaint in this matter on April 13, 2015. The sole Cause of Action alleges that in the midst of a dispute over commissions and back pay, Respondent violated FINRA Rules 5240 and 2010 by sending abusive and threatening e-mails and other communications to individuals at his former member firm employer, BC. The hearing is set for March 21, 2016. The parties made a number of motions in advance of the hearing. This Order disposes of each motion.

II. The Motions

A. Respondent's First Motion to Dismiss

On January 30, 2016, Respondent filed a "Motion to Dismiss on a Ground of Sufficiency of Evidence Review." Respondent contends that his "conduct, while unseemly, harmed no investors, sought no unfair compensation and had absolutely no effect on [the] securities market," and asserts that because any "violation is of a minor nature, and there is an absence of customer harm or detrimental market impact, [the] matter may be resolved with an informal disciplinary action, such as the issuance of a Cautionary Action."[1] Enforcement opposes the motion, arguing that Respondent fails to raise any material dispute as to the alleged violative conduct, and in light of the alleged violation Enforcement "may exercise its discretion [to bring an enforcement action] as it sees fit." As explained below, the motion will be denied.

[1] A written "Cautionary Action" is a form of informal discipline not reportable on FINRA's Central Registration Depository (CRD) system or Form BD. *See* FINRA Regulatory Notice 09-17 (Mar. 2009) at 3, http://www.finra.org/industry/notices/09-17.

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1. Legal Standard

FINRA's Rules of Practice do not expressly provide for motions to dismiss. Such motions are generally considered under the rule for summary disposition, FINRA Rule 9264.[2] This Rule is the vehicle for assessing the sufficiency of allegations supporting any claim set forth in the Complaint. The Rule requires that for purposes of the motion "the facts alleged in the pleadings of the Party against whom the motion is made shall be taken as true, except as modified by stipulations or admissions made by the non-moving Party, by uncontested affidavits or declarations, or by facts officially noticed pursuant to Rule 9145."[3]

2. Discussion

The allegations of the Complaint, stated below and presumed true for purposes of this motion, describe an extended campaign of harassment by Respondent against individuals at his former employer BC. BC terminated Respondent on April 7, 2014.[4] In retaliation, Respondent sent a series of offensive e-mails and phone calls where he disparaged, threatened, and harassed BC employees, including the company's president and a registered representative.[5] On April 9, Respondent left an obscene and highly insulting voicemail message for the registered representative.[6] One day later, Respondent sent three e-mails to an owner of BC making more disparaging remarks about the registered representative.[7] Over the next few days, Respondent sent several additional harassing e-mails and left additional harassing voicemails for the registered representative.[8] On April 23, Respondent sent an e-mail to the registered representative that was fabricated to appear to have come from a FINRA examiner. In this e-mail, the fictitious examiner purportedly stated that the registered representative was going to be arrested.[9] That same day, Respondent sent text messages to another BC employee suggesting that the FBI was "coming after" the registered representative.[10]

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[2] *Dep't of Enforcement v. Perles*, No. CAF980005, 2000 NASD Discip. LEXIS 9, at *19 (NAC Aug. 16, 2000), *aff'd*, Exchange Act Release No. 45691, 2002 SEC LEXIS 3395 (Apr. 4, 2002).

[3] Rule 9264(e). When the challenge is to the sufficiency of the allegations of the Complaint, the facts set forth in the Complaint itself effectively constitute the "statement of undisputed facts" called for by Rule 9264(d).

[4] Complaint ("Compl.") ¶ 4.

[5] Compl. ¶ 6.

[6] Compl. ¶ 7.

[7] Compl. ¶ 8.

[8] Compl. ¶ 10.

[9] Compl. ¶¶ 17, 19.

[10] Compl. ¶ 18.

These facts, if true, constitute improper threats and harassment.[11] FINRA Rule 5240 expressly proscribes this sort of conduct.[12] Even before the promulgation of Rule 5240, harassing conduct[13] was deemed inconsistent with the requirement that associated persons observe high standards of commercial honor and just and equitable principles of trade, now mandated by FINRA Rule 2010.[14]

To the extent that Respondent contends that the absence of any allegation of harm to investors or market impact resulting from the alleged misconduct undermines a harassment claim, his argument must be rejected. No showing of market impact or investor harm is required by the plain language of FINRA Rule 5240, which generally proscribes harassment "of any person" by an associated person without regard to market effect.[15] FINRA's National Adjudicatory Council has squarely held that market impact is irrelevant to a harassment claim[16]—Enforcement "need not show that the party being harassed was engaged in competitive activity (or that the respondent who harassed the other party was engaged in anticompetitive conduct)."[17] Equally irrelevant is the fact that the conduct did not harm investors.[18]

Because the Complaint adequately states a claim of harassment, Respondent's contention that the conduct was "minor" such that Enforcement should have gone no further than issuing a Cautionary Action or another course short of this disciplinary proceeding provides no cognizable

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[11] *See, e.g.*, *Dep't of Enforcement v. McCrudden*, No. 2007008358101, 2009 FINRA Discip. LEXIS 41, at *26 (OHO Oct. 15, 2009), *aff'd*, 2010 FINRA Discip. LEXIS 25 (NAC Oct. 15, 2010) (respondent's use of "abusive and threatening communications to bargain for the money he felt he was owed and to improve the terms of his termination" constituted harassment); *Dep't of Mkt. Regulation v. Aaron*, No. CLG050049, 2006 NASD Discip. LEXIS 11 (OHO Mar. 3, 2006); *Stephen B. Carlson*, Exchange Act Release No. 40672, 1998 SEC LEXIS 2463, at *9 (Nov. 12, 1998) (violation predicated upon "threatening, coercive, and intimidating tactics").

[12] Rule 5240(a)(3) prohibits any associated person from engaging, directly or indirectly, "in any conduct that threatens, harasses, coerces, intimidates or otherwise attempts improperly to influence" any other person.

[13] FINRA's rules do not define what it means to "harass." According to Webster's, "harass" means "to annoy persistently," or "to create an unpleasant or hostile situation for especially by uninvited and unwelcome verbal or physical conduct." Merriam-Webster's Collegiate Dictionary (2015 ed.). The conduct alleged here amply satisfies this definition.

[14] *Dist. Bus. Conduct Comm. v. Aspen Capital Group*, No. C3A940064, 1997 NASD Discip. LEXIS 53, at *9 (NBCC Sept. 19, 1997), *aff'd sub nom. Stephen B. Carlson*, Exchange Act Release No. 40672, 1998 SEC LEXIS 2463 (Nov. 12, 1998); *Dep't of Mkt. Regulation v. Respondent*, No. CMS030181, at 16 (NAC June 9, 2005), http://www.finra.org/sites/default/files/NACDecision/p014664_0.pdf.

[15] *See* Rule 5240(a)(3).

[16] *Dep't of Mkt. Regulation v. Respondent*, slip opinion at 5, n.5 (claim of harassment "does not require that the prohibited conduct have actually resulted in market or economic impact").

[17] *Dep't of Mkt. Regulation v. Respondent*, slip opinion at 5-6 (discussing substantially similar language in predecessor Rule IM-2110-5 proscribing "conduct that threatens, harasses, coerces, intimidates, or otherwise attempts improperly to influence" another member or associated person).

[18] *See Dep't of Mkt. Regulation v. Respondent*, slip opinion at 9 (anti-harassment provision provides "no limitation based on the status of the other party").

basis for dismissal. Neither Respondent nor any other Respondent has a right to dictate to Enforcement when it may bring an enforcement action.[19] As explained by the SEC in the context of its own administrative process, "the decision to institute proceedings was not meant to resolve disagreements between [Enforcement] and Respondents regarding the evidence; such disagreements are best left to be resolved at the hearing …."[20]

In this ongoing disciplinary proceeding, Respondent's contention that any alleged "violation is of a minor nature" puts the cart before the horse. The purpose of the upcoming hearing is to determine in the first instance whether a violation occurred; only then does consideration turn to what sanction is warranted for any violation proven, taking into account the pertinent facts of the conduct.[21] Accordingly, Respondent's pre-hearing argument that the violative conduct alleged in the Complaint "is of a minor nature" provides no basis for dismissal. The motion is **DENIED**.

B. Respondent's Second Motion to Dismiss

On February 5, 2016, Respondent filed a second motion to dismiss this action, this time alleging that members of Enforcement "tampered" with individuals expected to be witnesses at the hearing.[22] The gravamen of the motion is that two potential witnesses were subjected to "intimidation" by Enforcement as a result of being "informed that they were under FINRA jurisdiction and individually subject to discipline." Enforcement opposes the motion.

Again, because FINRA's Code of Procedure does not expressly provide for motions to dismiss, the motion must be considered under the rule for summary disposition, FINRA Rule 9264.[23] Because the present motion rests upon facts outside the four corners of the Complaint, it

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[19] *See* FINRA Rule 9211(a)(1) (affording Enforcement with the discretion to seek authorization to file a complaint *whenever* it "believes that any FINRA member or associated person is violating or has violated any rule, regulation, or statutory provision, including the federal securities laws and the regulations thereunder, which FINRA has jurisdiction to enforce"); *compare generally Kevin Hall, CPA*, Exchange Act Release No. 61162, 2009 SEC LEXIS 4165, at *78 (Dec. 14, 2009) ("Participants in the investigative process are not entitled to an uncritical or even a neutral [Enforcement] assessment of their asserted defenses …. These aspects of [Enforcement's] investigation fall squarely within the scope of the prosecutorial discretion that it routinely exercises in conducting … investigations.").

[20] *Hall*, 2009 SEC LEXIS 4165, at *81.

[21] *See generally* FINRA Sanction Guidelines (2015) (describing factors appropriately considered in determining sanctions), http://www.finra.org/industry/sanction-guidelines.

[22] On February 11, 2016, Respondent filed an "updated" version of the motion. The updated motion appears to be substantially identical to the original motion, with the exception of a different date on the last page and a different document included as "Exhibit A" to the motion.

[23] *Perles*, 2000 NASD Discip. LEXIS 9, at *19.

should have been supported by admissible evidence and a statement of undisputed facts, as required by FINRA Rule 9264(d). Respondent's failure to do so warrants denial of the motion.[24]

Moreover, the claimed conduct of Enforcement, including making contact with potential witnesses and reminding those individuals subject to FINRA's jurisdiction of their obligations, was not improper and provides no basis for dismissal. "The law is perfectly clear that both sides are entitled to interview witnesses prior to their testimony,"[25] and in that context Enforcement may remind witnesses of their obligations under FINRA rules.[26] And even if Respondent identified (and presented evidence of) potentially improper conduct, the National Adjudicatory Council has held that a respondent "may not maintain, as a matter of law, any defense that rests upon an assertion of FINRA misconduct to reduce or eliminate his own misconduct."[27] As Respondent's motion "rests upon an assertion of FINRA misconduct to reduce or eliminate his own misconduct," it is insufficient as a matter of law. The motion is **DENIED**.

C. Respondent's Motion to Permit Expert Testimony and Evidence

On February 4, 2016, Respondent filed a motion to submit "the testimony of Doctor Emad Mounir and medical records." Accompanying the motion are approximately 144 pages of what appear to be records of treatment for a variety of Respondent's medical conditions.

The motion is effectively an application to reconsider my ruling of December 22, 2015, excluding Respondent's medical records and limiting the testimony of his doctor to percipient, non-expert testimony based upon Respondent's failure to make proper disclosure of expert evidence (the "December Order").[28] Motions to reconsider are generally disfavored and are "not to be used for the losing party to rehash arguments previously considered and rejected."[29] Reconsideration is generally appropriate only "when new evidence surfaces, a new development

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[24] Where "Respondent's motion, although called a 'Motion to Dismiss,' relies on factual allegations that are not asserted in the Complaint … the absence of evidence to support Respondent's factual assertions requires that the motion be denied." OHO Order 08-11 (E3A20030495-01) at 2 (June 12, 2008), http://www.finra.org/sites/default/files/OHODecision/p039046_0.pdf.

[25] *First Jersey Securities*, Admin. Proc. Release No. 230, 1980 SEC LEXIS 2337, at *5 (Feb. 6, 1980).

[26] *John D. Audifferen*, Exchange Act Release No. 58230, 2008 SEC LEXIS 1740, at *38-39 (July 25, 2008) (where FINRA Enforcement counsel reminded witnesses of their obligation to testify truthfully and asked them to acknowledge that they understood that they could be subject to a disciplinary proceeding and the imposition of sanctions in the event that they testified untruthfully, "[t]hese questions served only to refresh their awareness of their existing obligations.").

[27] *Dep't of Enforcement v. Neaton*, No. 2007009082902, 2011 FINRA Discip. LEXIS 13, at *24 (NAC Jan. 7, 2011), *aff'd*, Exchange Act Release No. 65598, 2011 SEC LEXIS 3719 (Oct. 20, 2011).

[28] *See* OHO Order 15-15 (2014040968501) (Dec. 22, 2015), http://www.finra.org/sites/default/files/OHO_Order15-15_2014040968501.pdf.

[29] *See* OHO Order 98-28 (CAF970011) at 4-5 (July 20, 1998), http://www.finra.org/sites/default/files/OHO Decision/p007761.pdf.

changes the law, the order is clearly erroneous, or reconsideration is required to prevent 'a manifest injustice.'"[30]

In the December Order, I excluded Respondent's medical records in light of the fast approaching hearing in this matter (previously set in January), given that Respondent "failed to comply with the Scheduling Order's disclosure requirements" by not timely producing the records, and was "unable to represent when the records will become available or even if the records will be provided to Enforcement at all prior to the hearing."[31] While Respondent dismisses his failure to make timely disclosure of the evidence as the fault of his former counsel, the law is clear that a respondent such as Respondent must bear the consequences of the actions of his chosen representative.[32] Nevertheless, Respondent has now produced the materials to Enforcement. And the hearing on this matter has been continued until March 21, 2016, in part to provide Respondent the opportunity to prepare his defense now that he has determined to represent himself in this matter. In light of the continuance and Respondent's asserted need for the opportunity to prepare for the hearing, by order of February 1, 2016, I permitted Respondent the opportunity to supplement his pre-hearing submissions. Because the records have been produced in the time required by this subsequent order, and because Enforcement does not oppose this aspect of Respondent's motion, I will permit the medical records to be included in Respondent's proposed[33] exhibits.

The proffered expert testimony of Dr. Mounir stands on different footing. Because Respondent did not timely seek leave to present the testimony of Dr. Mounir or submit the written disclosures necessary for the presentation of expert witnesses under FINRA Rule 9242(a)(5), the December Order limited Dr. Mounir's testimony to those conclusions "within the province of a lay witness" and excluded any expert testimony "regarding the causation of any medical condition, or any resultant diagnosis or prognosis regarding the condition."

Although Respondent now seeks leave to present expert testimony from Dr. Mounir, his current application similarly fails to make the necessary expert disclosures. Other than his submission of over a hundred pages of undifferentiated, bulk medical records that appear to

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[30] *Dep't of Enforcement v. Thompson*, No. 2011025785602, 2015 FINRA Discip. LEXIS 9, at *15 (OHO Mar. 30, 2015).

[31] OHO Order 15-15 at 4-5.

[32] *Dep't of Enforcement v. Mission Securities Corp.*, No. 2006003738501, 2010 FINRA Discip. LEXIS 1, at *34, n.22 (NAC Feb. 24, 2010), quoting *Pioneer Inv. Serv. Co. v. Brunswick Assoc. Ltd. P'ship*, 507 U.S. 380, 397 (1993) ("[R]espondents are 'held accountable for the acts and omissions of their chosen counsel.'"); *see Scott Epstein*, Exchange Act Release No. 59328, 2009 SEC LEXIS 217, at *67 (Jan. 30, 2009) (where counsel voluntarily departs from hearing, "the decision and choice of [respondent] and [respondent's] agent, and any effect on the proceedings is solely their responsibility.")

[33] I make no determination as to the relevance or ultimate admissibility of the evidence. This Order holds only that the materials are not excluded because of their tardy disclosure. "[A] court is almost always better situated during the actual trial to assess the value and utility of evidence." OHO Order 16-04 (2012033393401) at 2 (Feb. 3, 2016), http://www.finra.org/sites/default/files/OHO_Order16-04_2012033393401.pdf.

relate to a variety of medical ailments, Respondent offers no inkling in his motion of the content or substance of the particular expert opinions of Dr. Mounir relevant to this matter and expected to be offered at the hearing. I noted in the December Order that advance disclosure of the substance of expert evidence "provides the opposing party the ability to present (or consult with) other experts who can more readily recognize the strengths and weaknesses of the testimony, facilitating fair cross-examination of the evidence." Despite additional time leading up to the upcoming hearing, Respondent has not addressed this concern, or offered any "substantial justification" for failing to do so at the time required by the Scheduling Order.[34]

Respondent's failure to make proper disclosure prejudices and unfairly disadvantages the opposing party in multiple respects. The party opposing the evidence cannot meaningfully respond because it does not know what opinions it must rebut; and it cannot move to challenge any opinions that may be legally deficient because those opinions have not been adequately disclosed.[35] And at this point, the hearing is less than one month away and the time for further motion practice has passed. Accordingly, the limitations imposed on the testimony of Dr. Mounir will stand, and Respondent's application to present expert testimony from the witness is denied.[36] Respondent's motion is **GRANTED IN PART** and **DENIED IN PART** as set forth above.

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[34] *See* FINRA Rule 9280(b)(2) ("A party that without substantial justification fails to disclose information required by the Rule 9240 Series … or otherwise required by order of the Hearing Officer … shall not, unless the failure was harmless, be permitted to use as evidence at the hearing … any witness or information not so disclosed.").

[35] Respondent comes closest to at least suggesting areas of expert testimony he hopes to offer in his reply—an inappropriate manner of disclosure that, among other things, deprives Enforcement any opportunity to respond. Respondent claims that the testimony "is very important … to clearly show and educate" the panel on the nature of bipolar disorder. But even here Respondent never states with any specificity the actual expert opinions he expects Dr. Mounir to provide, much less provide all of the disclosures called for by Rule 9242(a)(5). Respondent suggests that expert testimony is necessary to show that memory loss is a symptom of his disorder, and—without any statement of diagnosis regarding his actual symptoms—implies that purported memory loss on his part will explain certain discrepancies in his sworn on-the-record testimony. But discussion of "typical" symptoms of a disorder, unconnected to Respondent in particular, is not proper expert evidence. *See Rink v. Cheminova, Inc.*, 400 F.3d 1286, 1294 (11th Cir. 2005), *cert. denied*, 203 F.R.D. 648, (Absent expert evidence regarding diagnosis and causation, testimony "regarding the usual symptoms of [the disorder] … is irrelevant."). And as Respondent notes, his medical records have been received as proposed exhibits without objection. To the extent that he actually suffers from memory loss and consulted on these issues for treatment purposes with his physicians, any such issues will presumably be evidenced in those records.

[36] Respondent argues that it is unfair to permit Enforcement to present expert evidence from its forensic computer expert while depriving him similar ability to present expert testimony. But Enforcement submitted an application – without objection—to offer expert testimony that included a detailed, specific report identifying, among other things, the expert's qualifications, the specific facts the expert relied upon, as well as the conclusions and opinions of the expert in compliance with FINRA Rule 9242(a)(5). *See* CX-40. This disclosure provided Respondent a fair opportunity to understand and prepare to cross-examine the expert's anticipated testimony. No comparable disclosure has been made with respect to Dr. Mounir.

D. Respondent's Motions to Submit Exhibits and Witnesses

On February 8, 2016, and again on February 10 and 11, 2016, Respondent submitted multiple applications to permit the supplementation of his exhibit and witness lists with various additional exhibits and witnesses. These applications are addressed as follows:

1. On February 8, Respondent filed two applications—the first seeks to supplement his proposed exhibits with three photographs that Respondent asserts are necessary to cross-examine the forensic computer expert disclosed by Enforcement. Enforcement does not object to the inclusion of the photos with Respondent's proposed exhibits. The application to include these materials in Respondent's proposed exhibits is therefore granted.

2. Respondent's second February 8 application seeks leave to supplement his proposed exhibits with his Wells submission provided to Enforcement before this action was filed. Enforcement does not object to the application other than with respect to one of two affidavits of witness "M.E." included with the Wells submission. Enforcement specifically objects to the affidavit dated November 14, 2014, because it describes conduct unrelated to Respondent or the present proceeding. Respondent argues that alleged misconduct at his former employer unrelated to the allegations here, in a branch office where Respondent did not work, is relevant to show "the culture of BC."

FINRA Rule 9263 permits a Hearing Officer to exclude evidence that is irrelevant, immaterial, unduly repetitious, or unduly prejudicial. "The Hearing Officer is granted broad discretion to accept or reject evidence under this rule."[37] While determinations of relevance are frequently best left to the hearing,[38] the relevance of "the culture of BC" is not apparent. The focus of the Complaint is Respondent's conduct, and not others at his former firm. While presentation of evidence that provides context for the conduct at issue is reasonable, evidence of conduct that did not involve Respondent, in an office where he did not even work, stretches context too far.

And aside from questions of relevance, both parties agree that witness M.E. will testify at the hearing. Enforcement has issued a Rule 8210 request to secure his appearance. Although sworn affidavits are generally admissible in a FINRA proceeding,[39] "live testimony is preferred" and should be "used when available."[40] Because the declarant will be available to provide his evidence in person at the hearing, I will exclude the November 14, 2014 affidavit.

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[37] *Dep't of Enforcement v. Brookstone Sec., Inc.*, No. 2007011413501, 2015 FINRA Discip. LEXIS 3, at *110 (NAC Apr. 16, 2015).

[38] *See supra*, note 33.

[39] *See Harry Gliksman*, 54 S.E.C. 471, 480-81 (1999) (finding customer affidavit to be probative, reliable, and admissible), *aff'd*, 24 F. App'x 702 (9th Cir. 2001).

[40] *Dep't of Enforcement v. DaCruz*, No. C3A040001, 2007 NASD Discip. LEXIS 1, at *40, n.31 (NAC Jan. 3, 2007).

3. Respondent's February 10, 2016 application seeks to permit the testimony of eleven witnesses and four exhibits. Enforcement objects[41] to only two of the witnesses identified by Respondent, witnesses V.B. and M.A. Respondent does not assert that either witness will testify regarding any of the conduct or events alleged in this proceeding, but will instead offer evidence of "the good character of respondent." Enforcement correctly contends that such evidence is irrelevant to the question of sanctions, as the Sanction Guidelines "do not include a respondent's character, or evidence regarding a respondent's character, as a factor that should have any bearing upon the determination of appropriate sanctions." Indeed, in *Department of Enforcement v. Winters*, the National Adjudicatory Council rejected testimony of a respondent's good character as not "germane to our sanctions determination" and accordingly gave the evidence "no mitigative weight."[42]

But the irrelevance of character evidence to sanctions does not speak to its potential relevance to an initial determination of liability. Generally, courts permit an accused to "introduce affirmative testimony that a general estimate of his character is so favorable that the jury may infer that he would not be likely to commit the offense charged."[43] And "time-honored principles" permit introduction of evidence of an accused's specific character for truthfulness and veracity (1) where the charge involves a lie or falsehood; (2) where the accused testifies on his own behalf and his credibility has been attacked; or (3) where the truth of out-of-court statements made by the accused have been attacked.[44] Although the claim against Respondent does not necessarily require proof of misrepresentation, the truth of Respondent's out-of-court statements are at significant issue—it is alleged, but disputed by Respondent, that he falsified an e-mail communication from a FINRA representative in furtherance of harassing conduct. Respondent's credibility is squarely at issue, particularly given that both sides will present him as a witness. Consequently, I cannot say that two witnesses on the topic of Respondent's character are entirely irrelevant or excessive in light of the circumstances. Enforcement's objections to witnesses V.B. and M.A. are overruled.

Respondent also submitted four proposed exhibits with his February 10 application, designated Exhibits A through D. Exhibit A is a hand-written post-it note with what appears to be communications between Respondent and others at BC. Enforcement does not object to the

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[41] Enforcement has undertaken to issue Rule 8210 requests prior to the hearing to secure the appearances of witnesses A.V. and F.O., and has promised to produce examiner witness S.D. To the extent that Enforcement calls any witness during its case-in-chief that Respondent wishes to examine, Respondent will conduct both his cross-examination and any direct examination of the witness following Enforcement's direct examination.

[42] *Dep't of Enforcement v. Winters*, No. E102004083704, 2009 FINRA Discip. LEXIS 5, at *15-16 (NAC July 30, 2009).

[43] *Michelson v. United States*, 335 U.S. 469, 477 (1948) ("this line of inquiry firmly denied to the State is opened to the defendant because character is relevant in resolving probabilities of guilt"); *see Thomas C. Gonnella*, Admin. Proc. File No. 3-15737, 2014 SEC LEXIS 2349, at *6 (July 2, 2014) (In SEC administrative proceeding, respondent "may present character testimony.").

[44] *United States v. Hewitt*, 634 F.2d 277, 279 (5th Cir. 1981).

proposed exhibit, so long as it is permitted to supplement its exhibits to include its proposed exhibit CX-45, a seven-page executed agreement between Respondent and BC. Both proposed exhibits will be permitted.

Enforcement objects to proposed Exhibits B, C, and D,[45] which include certain Instagram photos and materials from former BC employee K.S. (Exhibit C) and a BrokerCheck report for broker A.R. (Exhibit D). Enforcement contends that both exhibits are irrelevant. While Enforcement is correct that employee K.S. "is not on trial here," Respondent asserts that the Instagram photos "describe [the] work environment that create[d] the burst of the manic attack that leads to the misconduct of [Respondent]." Given his proffer that the photos will provide some context to the conduct at issue, I will permit proposed Exhibit C to be added to Respondent's proposed exhibits.

With respect to Exhibit D, however, the sole proffered basis of the evidence is to demonstrate that "this individual only received three months and $5,000 in a settlement, when he fraudulently executed a client's signature." Respondent appears to contend that the remedy imposed against broker A.R. should be taken into account in determining what sanction, if any, is warranted here. While determination of necessary sanctions is a relevant issue for the hearing, the law is clear that "the appropriate remedial action depends on the facts and circumstances of each particular case, and cannot be precisely determined by comparison with action taken in other cases."[46] As Exhibit D does not involve any allegation of harassment or other misconduct violative of Rule 5240, the dissimilar conduct reflected in the proposed exhibit does not bear on the "facts and circumstances" of the conduct alleged here, and is therefore excluded as irrelevant.[47]

Accordingly, Respondent's motions are **GRANTED IN PART** and **DENIED IN PART** as set forth above. As to the proposed exhibits permitted by this Order, Respondent shall conform the exhibits to the format set forth in the Scheduling Order in this matter by paginating the exhibits and marking each with an "RX-" designation. All conformed proposed exhibits shall be produced to Enforcement by **March 11, 2016**. Any proposed exhibits not so produced may be excluded at the hearing.

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[45] Exhibit B is a duplicate of the November 14, 2014 Affidavit of M.E. For the reasons explained above, the affidavit is excluded.

[46] *Dep't of Enforcement v. Cuozzo*, No. C9B050011, 2007 NASD Discip. LEXIS 12, at *39-40 (NAC Feb. 27, 2007), *quoting Pacific On-Line Trading & Sec., Inc*., Exchange Act Release No. 48473, 2003 SEC LEXIS 2164, at *20 (Sept. 10, 2003); *Dist. Bus. Conduct Comm. v. Bruff*, No. C01960005, 1997 NASD Discip. LEXIS 41, at *24, n.13 (NBCC Aug. 11, 1997), *aff'd*, 53 S.E.C. 880 (1998) (rejecting respondent's arguments "that less severe sanctions have been imposed in similar cases [because] each case is unique and that sanctions cannot be calculated by reference to other matters").

[47] *See* OHO Order 06-58 (E8A2003084806) (Dec. 28, 2006), http://www.finra.org/sites/default/files/OHODecision/p018438.pdf ("Respondent is precluded from introducing evidence of the sanctions imposed on other registered representatives at [the Respondent's firm].").

E. Respondent's Request to Withdraw the Complaint

On February 20, 2016, and later on February 23, 2016, Respondent filed a "Motion to Request Enforcement to Withdrawal," and a "Motion for Summary Disposition." Both motions make substantially similar arguments and seek the same relief—an order requiring Enforcement to withdraw the present complaint. Respondent argues in both motions that the recent settlement of an his arbitration proceeding involving BC, which resolved claims between Respondent and his former employer, somehow precludes this action because BC or its employees are purportedly "agents" of Enforcement for purposes of this action.

In addition to being untimely,[48] Respondent's application is without merit. His assertion that under the terms of settlement, BC "is obligated to withdraw his harassment case" misapprehends the nature of this action. BC is not a party to the case; Enforcement brings this action to enforce FINRA's rules pursuant to congressionally delegated authority "to enforce, *at [its] own initiative*, compliance by members of the industry with both the legal requirements laid down in the [Securities Exchange Act of 1934] and the ethical standards going beyond those requirements."[49] In this context, the fact that Respondent may have resolved his differences with his former employer is irrelevant.[50] Both motions seeking an order directing the withdrawal of the complaint are **DENIED**.

F. Respondent's Remaining Application

On February 8, 2016, Respondent sent an e-mail to the electronic mailbox for the Office of Hearing Officers requesting that a letter of apology, dated December 4, 2015 and signed by Respondent as a part of a resolution of the arbitration proceeding described above, be "take[n] … from evidence[]." The letter is included in Enforcement's proposed exhibit CX-44, which was received without objection.

First, a request for relief by e-mail communication that fails to conform to the required format for filings in disciplinary proceedings is improper.[51] Second, the only basis offered by Respondent for excluding the evidence is that he does not agree with the statements therein and only signed the document because "prior counsel advised that this letter [would not be] presented to Enforcement." Respondent is free to explain at the hearing the circumstances surrounding the execution of the letter should he choose to do so. But the fact that he no longer stands by his own signed statement provides no legal basis for excluding the evidence. His application is **DENIED**.

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[48] Enforcement did not respond to either application, presumably because both came after the deadline for pre-hearing motions imposed by my Order of February 1, 2016. That Order required Respondent to file any pre-hearing motion by February 12, 2016. The motions are denied as untimely as well as on the merits.

[49] *Austin Mun. Sec., Inc. v. NASD*, 757 F.2d 676, 680 (5th Cir. 1985) (emphasis supplied).

[50] *See Dep't of Enforcement v. Prout*, No. C1990014, 2000 NASD Discip. LEXIS 47, at *19 (OHO Mar. 20, 2000) (in the context of a disciplinary proceeding, the panel need not "defer to a member's determination as to the appropriate sanction and allow its judgment to substitute for the Hearing Panel's independent judgment.").

[51] FINRA Rule 9136 (describing the proper format for filed papers).

G. Enforcement's Motion to Present Telephone Testimony

On February 12, 2016, Enforcement filed a motion to permit its computer forensic expert L.K. to testify by telephone. Enforcement represents that L.K. stood willing to appear at the hearing in New York in January, when it was originally scheduled, but he has since retired to Texas. Enforcement represents that at present L.K. is unable to travel to New York due to family responsibilities, including caring for his two children. Respondent opposes the motion, arguing that the witness should be required to appear in person.

"In all cases, hearing panels and parties would prefer to have witnesses testify in person." Nevertheless, "telephone testimony is often a practical necessity, because [FINRA] has no power to compel the attendance of witnesses who are not subject to [FINRA's] jurisdiction."[52] Here, L.K. is not subject to FINRA's jurisdiction and cannot be compelled to testify. That said, L.K. is Enforcement's expert witness. Inherent in a party seeking permission to present expert testimony is the responsibility of actually proffering the witness where leave is granted. Ordinarily a party should be required to present its own experts in person.[53]

The circumstances here, however, warrant a departure from this principle. The witness was prepared to testify at the scheduled time of hearing, and presumably would have been available to testify at any time prior to his retirement. The hearing was rescheduled beyond that date at the specific request of Respondent. Enforcement should not be penalized as a result of the coincidence of the timing of the rescheduled hearing. The Hearing Panel would benefit from L.K.'s testimony. And it is well established that telephone testimony is permissible in FINRA disciplinary proceedings, and that permitting telephone testimony is not inherently unfair.[54] Although it is always preferable for witnesses to testify in person, it is permissible to allow testimony by telephone so long as a respondent is afforded a "full and fair opportunity to cross

[52] OHO Order 06-21 (CAF040079) at 2 (Mar. 8, 2006), http://www.finra.org/sites/default/files/OHODecision/p017562.pdf.

[53] *See* OHO Order 06-32 (CLG050021) at 3 (Apr. 25, 2006), http://www.finra.org/sites/default/files/OHODecision/p017527.pdf.

[54] *Dep't of Enforcement v. Brigandi*, No. C10040025, 2007 NASD Discip. LEXIS 3, *24 (NAC Jan. 17, 2007), citing *Daniel Joseph Alderman*, 52 S.E.C. 366, 368 (1995); *Robert W. Gibbs*, Exchange Act Release No. 35998, 1995 SEC LEXIS 1824, at *16 (July 20, 1995); *Keith L. DeSanto*, 52 S.E.C. 316, 319 n.5 (1995), *aff'd*, 1996 U.S. App. LEXIS 5304 (2d Cir. Mar. 22, 1996).

examine."[55] While "[c]ross-examination may be more difficult over the telephone … it can be done effectively, and hearing panels are able to evaluate the credibility of witnesses who testify by telephone, even though they cannot observe the witnesses' demeanor."[56]

On balance, I find that permitting L.K.'s telephone testimony is reasonable under the facts and circumstances of this case. Enforcement's motion is **GRANTED**, subject to the requirements set forth below:

Any telephone or video conference testimony is subject to the following requirements:

(i) The parties should arrange for the technology necessary for the testimony to be heard by the Hearing Panel.

(ii) In advance of the hearing, the proponent of the testimony should obtain a signed, notarized affidavit or declaration from the witness affirming that the testimony to be given by the witness will be the truth, the whole truth, and nothing but the truth. That document should be provided to the adverse party in advance of the first day of hearing and presented to the Hearing Panel at the hearing for entry into the record prior to the witness's testimony.

(iii) The proponent of the testimony should provide the witness with any exhibits to be the subject of testimony, including any exhibits that the adverse party wishes to examine the witness about. The adverse party shall supply any exhibits for the witness to the proponent of the testimony within seven days from the entry of this Order.

(iv) The proponent of the testimony should arrange for the witness to be available for a block of time during the hearing to minimize any disruption of the proceeding.

(v) The parties should coordinate on these matters with the goal of rendering the presentation of evidence at the hearing clear and efficient.

III. Conclusion

This Order resolves the pre-hearing motions of the parties. Respondent's first motion to dismiss, second motion to dismiss, his "Motion to Request Enforcement to Withdrawal," "Motion for Summary Disposition," and his e-mailed objection to evidence are **DENIED**. His motions to present expert testimony and medical evidence, as well as his motions to supplement

[55] *Dist. Bus. Conduct Comm. v. Gibbs*, 1991 NASD Discip. LEXIS 93, at *29 (NBCC Aug. 26, 1991), *aff'd*, 51 S.E.C. 482 (1993), *aff'd*, 25 F.3d 1056 (10th Cir. 1994) (table).

[56] OHO Order 06-21 at 2.

his exhibit and witness lists, are **GRANTED IN PART and DENIED IN PART** as set forth above. Enforcement's motion to present telephone testimony is **GRANTED**.

SO ORDERED

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David Williams
Hearing Officer

Dated: March 3, 2016